Illinois Bell Telephone Company *and* Carol Gilbert.
Case 13-CA-18818

January 27, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On July 22, 1981, Administrative Law Judge Benjamin Schlesinger issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in answer and response to the Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Illinois Bell Telephone Company, Chicago, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

[1] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. On March 25, 1980, Administrative Law Judge C. Dale Stout died after the hearing in the instant case had closed. On May 18, 1981, before the filing of briefs, Administrative Law Judge Benjamin Schlesinger was designated to prepare and issue a Decision based on the record made before Administrative Law Judge Stout. It is the Board's established policy to attach great weight to an administrative law judge's credibility findings, insofar as they are based on demeanor. However, in contested cases, the Act commits to the Board itself the power and responsibility of determining the facts as revealed by a preponderance of evidence, and the Board is not bound by the administrative law judge's findings of facts, but bases its findings upon a *de novo* review of the entire record. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). Administrative Law Judge Schlesinger's credibility findings are based on factors other than demeanor, and, in consonance with the Board's policy set forth in *Standard Dry Wall Products, Inc., supra*, we have independently examined the record in this case. We find there is no basis on the record in this proceeding for reversing his credibility determinations or his findings of fact based thereon.

DECISION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BENJAMIN SCHLESINGER, Administrative Law Judge: This proceeding was heard before Administrative Law Judge C. Dale Stout, now deceased, on February 4 and 5, 1980, in Chicago, Illinois, based on an unfair labor practice charge filed by Charging Party Carol Gilbert on June 14, 1979,[1] and a complaint issued on August 15, alleging violations of Section 8(a)(1) of the National Labor Relations Act, as amended, 29 U.S.C. § 151, *et seq.* On May 18, 1981, I was designated as the administrative law judge to determine whether Respondent Illinois Bell Telephone Company has violated the Act, which it denies in all respects.

It is admitted, and I conclude, that Respondent, an Illinois corporation, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. It is engaged in the business of providing telephone service, has during the calendar year preceding the complaint derived gross revenues in excess of $100,000 in the course and conduct of its business operations, and during the same period has received goods and services valued in excess of $50,000 at its Illinois locations directly from points located outside the State of Illinois. It is also admitted, and I conclude, that Communications Workers of America District 5 (herein the Union) is a labor organization within the meaning of Section 2(5) of the Act and has been, at all times material herein, the collective-bargaining representative of employees, including Gilbert, at its Lake Shore, Illinois, facility.

In April 1979, Gilbert, a directory assistance operator employed by Respondent since 1972, transferred to Respondent's Lake Shore facility and was given her first monthly evaluation by Group Manager Joyce Brumgart on May 2, who criticized Gilbert's 168 minutes of time out-of-board (TOOB), which is the amount an operator is away from the work station for any reason.[2] Brumgart stated that Gilbert's TOOB in April was "totally unacceptable," and that she must show "immediate and substantial improvement."

Gilbert grieved this warning, complaining, *inter alia*, that her TOOB was unfairly calculated, that she was refused access to the records of her TOOB, and that Brumgart refused to state how much TOOB was acceptable, so that Gilbert did not know what improvement was necessary to satisfy Respondent. Her grievance was presented by a union steward to June Lambertino, Respondent's manager and an admitted supervisor under Section 2(11) of the Act who was in charge of first-level grievances, and was pending disposition at the time of the hearing herein.

On June 8, Brumgart reviewed Gilbert's performance in May. Brumgart, although complementing Gilbert on her productivity, noted that her 123 minutes of TOOB was an improvement, but was still not acceptable. Gilbert's request for the presence of a union representative was rejected, as was her request for the records to substantiate her TOOB, a request which Brumgart stated she would discuss with her manager, Lambertino. Returning to her board, Gilbert called to make an appoint-

[1] All dates hereinafter set forth refer to the year 1979, unless otherwise stated.

[2] TOOB includes time for going to a restroom, getting a drink of water, or moving to a different telephone board because of malfunctions of equipment or because of drafts.

ment with Lambertino, whom she met after lunch that day.

There is no question that Gilbert asked Lambertino for a "furlough," which is time off which may be granted if there are sufficient employees to fill in for the employee. She also asked, although the extent of her discussion is at issue, to obtain her TOOB records and, when those were refused, said, according to Lambertino, "You're bullshit." Gilbert's testimony was different. She stated that, when Lambertino denied her the records, she then asked what was an acceptable amount of TOOB, to which Lambertino replied: "Zero minutes." Gilbert's reply was "Bullshit." In either event, there is no question that Lambertino immediately suspended Gilbert, a suspension which lasted for 2-1/2 days, without pay, and on June 11 announced to Gilbert that she had been put on "final warning," which meant that any further infraction would cost Gilbert her job. At least as of mid-November, and I infer as of the time of the hearing, the final warning remained on Gilbert's record.

No matter how the evidence is viewed, Gilbert was engaged in protected concerted activities because she was grieving her job review by Brumgart, who had once again criticized Gilbert for her "unacceptable" TOOB, and was seeking information pertinent to her grievance. Although Gilbert's request of Lambertino for a furlough was clearly personal and not protected, her discussion of TOOB was concerted because it involved implementation and enforcement of the grievance procedure of the company-union collective-bargaining agreement which is an "extension of the concerted activity giving rise to that agreement," protected by Section 7 of the Act. *Merlyn Bunney and Clarence Bunney, partners, d/b/a Bunney Bros. Construction Company*, 139 NLRB 1516, 1519 (1962); *Interboro Contractors, Inc.*, 157 NLRB 1295 (1966), enfd. 388 F.2d 495 (2d Cir. 1967).[3] In addition, the grievance was a matter of mutual concern to other workers, as illustrated by newsletters which Gilbert published with at least one other employee, protesting harassment about restroom breaks, discipline caused by malfunctioning equipment, and monitoring employees' whereabouts to establish cause for discipline—all of which were concerns of a constituent local of the Union.

Respondent argues that Gilbert was not enforcing a provision of the labor agreement, but surely she was protecting herself from the potential loss of her job. If, indeed, her TOOB was unacceptable, and if it were not improved, loss of employment was a likely consequence.[4] Her attempt through the grievance procedure would have an impact on the terms and conditions of employment of all her fellow employees. Respondent also argues, citing some authority, that Gilbert acted outside the agreement's grievance procedure and thus engaged in unprotected activities. That is not so, and I specifically discredit Lambertino's testimony that grievances are only presented by union stewards. The agreement provides that individual employees may pursue their own grievances, as follows:

> 3.06 Nothing in this Agreement shall be construed as restricting the rights of employees, individually or collectively, to present grievances to the Company, through the regular channels of the Company's administrative organization.
>
> 3.07 The Company agrees, however, that after a grievance has been referred to a Union representative and such representative has dealt with a Company representative with respect thereto, no Company representative will discuss the matter with the employee or employees involved unless a Union representative is given an opportunity to be present at any such discussions or conferences.[5]

My review of the record persuades me that Gilbert's recollection of her meeting with Lambertino on June 8 was much more precise than that of Lambertino. Gilbert's uncontradicted, clear, and detailed narration of her conferences with Brumgart, in which she specifically set forth all her complaints, grievances, and arguments; her zeal in being the "watchdog" of every alleged breach by Respondent of the bargaining agreement, including her filing of five or six grievances over a 3-month period and her intense involvement in the affairs of the Union;[6] and her preparation of newsletters criticizing Respondent's treatment of its employees, all convince me that Gilbert's detailed testimony of what she and Lambertino talked about on June 8 is more probable. I, therefore, find that, at that meeting, Gilbert told Lambertino that she had some issues regarding working conditions that she wished to discuss; that she made a further request for records of her TOOB which had earlier been denied to her by Brumgart; that she asked and received an answer to the name of the form on which information was recorded; that there was a thorough discussion of Lambertino's reasons for refusing to release the records to Gilbert; that Gilbert replied that records of the names of other employees' TOOB could be covered or only Gilbert's records could be copied, in order to allay Lambertino's fears that the privacy of other employees would be invaded; that Lambertino switched the conversation to the matter of Gilbert's knowledge of what was expected of her, calling Gilbert "dear heart"; that Gilbert professed

[3] The Board's *Interboro* doctrine has not been universally embraced in enforcement proceedings. It withstood attack in *N.L.R.B.* v. *Selwyn Shoe Manufacturing Corporation*, 428 F.2d 217, 221 (8th Cir. 1970); *N.L.R.B.* v. *Ben Pekin Company*, 452 F.2d 205, 206 (7th Cir. 1971); (but see *N.L.R.B.* v. *Slotkowski Sausage Company*, 620 F.2d 642 (7th Cir. 1980); and *Roadway Express, Inc.*, 217 NLRB 278 (1975), enfd. 532 F.2d 751 (4th Cir. 1976). Contra, *Kohls* v. *N.L.R.B.*, 629 F.2d 173 (D.C. Cir. 1980); *Krispy Kreme Doughnut Corp.* v. *N.L.R.B.*, 635 F.2d 304 (4th Cir. 1980); *N.L.R.B.* v. *Northern Metal Company*, 440 F.2d 881 (3d Cir. 1971); *N.L.R.B.* v. *Buddies Supermarkets, Inc.*, 481 F.2d 714 (5th Cir. 1973) (but see *Anchortank, Inc.* v. *N.L.R.B.*, 618 F.2d 1153, 1160-61 (5th Cir. 1980)); *ARO, Inc.* v. *N.L.R.B.*, 596 F.2d 713 (6th Cir. 1979).

[4] Lambertino conceded that an employee could be warned for excessive TOOB.

[5] Gilbert attempted to use this provision as a double-edged sword. When she was counseled by Brumgart on June 8, she complained that she could not be disciplined without a union steward being present, because she had previously filed a grievance involving TOOB. Even though she took this position, she still had the right to present her grievance to Lambertino later in the day.

[6] Gilbert was a past executive board member of Local 5016, which is a constituent part of the Union.

that she did not know, to which Lambertino said "Zero minutes out-of-board," and Gilbert replied, "Bullshit."

Fairly read, it is clear that Gilbert was concerned that she was being treated disparately from the other employees. If she were being targeted for adverse criticism because of her TOOB, it was her right to ascertain whether other employees, who she testified without contradiction also had TOOB, were being similarly counseled and what conduct she would have to engage in to satisfy Respondent. Rebuffed by Brumgart earlier that day, Gilbert asked for an appointment with Lambertino to pursue this matter, as she had a right to do under Respondent's collective-bargaining agreement.

Because Gilbert was complaining of her evaluation that morning, Board law involving a grievance meeting is applicable. The Board has long held that parties in grievance discussions should not be inhibited in pursuing their claims and that merely because a union representative employee uses obscenities, the protection afforded the activity by Section 7 of the Act is not lost and the use of an obscenity may not constitute justification for an employer to discipline its employee. *Thor Power Tool Company*, 148 NLRB 1379 (1964), enfd. 351 F.2d 584 (7th Cir. 1965); *Crown Central Petroleum Corporation* v. *N.L.R.B.*, 430 F.2d 724 (5th Cir. 1970); *United States Postal Service*, 250 NLRB 4 (1980); *Hawthorne Mazda, Inc.*, 251 NLRB 313 (1980). The use of vulgarities can never be judicially applauded, but it cannot be said that Gilbert's rejoinder was entirely unprovoked. Emergencies do occur, and for Respondent to insist that an employee's performance must be unacceptable unless the employee is chained to the working place, without a moment of leave, seems at least somewhat exaggerated.[7] On the other hand, Respondent undoubtedly has some justification in not drawing an absolute line between acceptability and lack of it to ensure that employees do not take advantage of even a minimal amount of time; so there was reason for Respondent to adhere to its position. But, merely because Gilbert supported her own argument with an epithet does not downgrade the discussion of the disagreement to a point where she ought to be denied the protected right to pursue the grievance. *Dreis & Krump Manufacturing Company, Inc.* v. *N.L.R.B.*, 544 F.2d 320 (7th Cir. 1976).[8]

Accordingly, I conclude that Respondent, by warning and suspending Gilbert, violated Section 8(a)(1) of the Act and that its activities, occurring in connection with its business operations described above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Having found that Respondent suspended Gilbert for 2-1/2 days without pay, I shall recommend that Respondent be ordered to make her whole for any loss of earnings she may have suffered thereby, with interest thereon to be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[9] I shall also recommend that Respondent be required to expunge and remove from all of its records any references to the warning and suspension it gave to Gilbert.

Upon the foregoing findings of fact and conclusions of law, the briefs filed by the General Counsel and Respondent, and the entire record,[10] and purusant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[11]

The Respondent, Illinois Bell Telephone Company, Chicago, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing employees by suspending them or issuing to them final warnings for engaging in protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Make Carol Gilbert whole for any loss of pay she suffered by reason of her unlawful 2-1/2 days' suspension, computed in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Revoke, expunge, and physically remove from its records any warnings and suspension notices and any references thereto relating to the suspension of Carol Gilbert for 2-1/2 calendar days beginning on June 8, 1979.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll and all other records required to ascertain the amounts of any backpay due under the terms of this Order.

[7] Gilbert denied that she cursed at Lambertino. The word "bullshit" is defined by "The American Heritage Dictionary of the English Language, 1969," as: "Foolish, uninformed, or exaggerated talk." Although "vulgar slang," it was appropriate to define what Gilbert intended to convey.

[8] Respondent cites *Atlantic Steel Company*, 245 NLRB 814 (1979) to support its actions. There, however, the Board refused to protect the use of an obscenity as it would "a spontaneous outburst during the heat of a formal grievance proceeding." *Id.* at 816. As to the factors of the protection —"(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice"—the Board stated: "To reach a decision, the Board . . . must carefully balance these various factors." *Ibid.* The Board did not find that opprobrious conduct causes the loss of Sec. 7 rights only when provoked by illegal activity. Rather, that is only to be considered. Parenthetically, I find that the first three factors have clearly been met.

[9] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[10] The General Counsel moved to correct the official transcript in various respects. There having been no opposition, the motion is granted and the transcript is amended accordingly.

[11] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(d) Post at its Lake Shore, Illinois, facility copies of the attached notice marked "Appendix."[12] Copies of said notice, on forms provided by the Regional Director for Region 13, after being duly signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices employees are customarilay posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[12] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT suspend, issue final warnings to, or otherwise punish our employees for exercising such rights.

WE WILL NOT in any like or related manner do anything that interferes with, restrains, or coerces our employees with respect to these rights.

WE WILL make Carol Gilbert whole for any loss of pay she suffered by reason of her unlawful suspension for 2-1/2 calendar days beginning on June 8, 1979.

WE WILL revoke, expunge, and physically remove from our records and files any warnings and suspension notices relating to the suspension of Carol Gilbert beginning on June 8, 1979.

ILLINOIS BELL TELEPHONE COMPANY